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Supreme Court of the United States

OCTOBER TERM, 1958

No. 863

GLORIA L. MESSINA, as Administratrix of the goods, chattels and credits which were of JOSEPH C. MESSINA, deceased,

Petitioner,

v.

CLARK EQUIPMENT COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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Respondent states in its brief in opposition (pp. 13-14) that "no action will lie in negligence unless defendant owed a duty to decedent"; that "[g]eneral custom and usage cannot create a duty—it is only evidence to measure reasonable care when a duty is owed"; and that "[s]ince the defendant herein owed no duty to decedent proof of general custom and usage was irrelevant". This in substance is respondent's entire answer to the petition.

1. The question at issue is the liability of a manufacturer under New York law for failure to comply with a general practice or custom of equipping a machine or instrumentality with safety devices or guards to prevent injury to the ultimate user thereof from a danger that is patent and manifest. This question is not whether the manufacturer owes a duty to the ultimate user; rather, the question is one of standard of care, that is, whether the manufacturer created an unreasonable risk of harm to the ultimate user. This is more than a semantic di-

tinction, For if a manufacturer owes no duty to the ultimate user, then the manufacturer would not be liable to the ultimate user irrespective of the nature of the defect in the manufacturer's product (or the unreasonableness of the risk of harm) and this has not been the law in New York ever since the decision in *MacPherson* abolished the doctrine of privity as between the manufacturer and the ultimate user. That the liability of the manufacturer to the ultimate user is governed by generally applicable principles of negligence—the unreasonableness of the risk of harm—is made as clear as language permits in the decision in *Smith* v. *Peerless Glass Co.*, 259 N. Y. 292, 295 (1932), where, in holding the manufacturer of bottles liable for failure to use ordinary and customary methods to detect defects in the bottles and in further holding the bottling company not liable since there was no evidence that it failed to use any tests customarily used by bottling companies, the New York Court of Appeals stated:

> "There emerges, we think, a broad rule of liability applicable to the manufacturer of any chattel, whether it be a component part or an assembled entity. Stated with reference to the facts of this particular case, it is that, if either defendant was negligent in circumstances pointing to an unreasonable risk of serious bodily injury to one in plaintiff's position, liability may follow though privity is lacking. Ref. The American Law Institute, Restatement of the Law of Torts, sections 265 and 266."

Indeed, the decision by the New York Court of Appeals in *Campo*, itself, views the question as being one of standard of care (or the unreasonableness of the risk of harm), for it is stated therein that "entirely lacking is any allegation of fact indicating that defendants foresaw or should reasonably have foreseen a danger to one using the machine for its intended purpose" (301 N. Y. 468, 472; petition, Appendix D, p. 31). And, as Judge Clark pointed out below, "Here, we have both the allegation

and the proof of the facts [a general industry practice of installing safety devices] absent in the *Campo* case" (petition, Appendix A, p. 17). Consequently, respondent's contention that its failure to comply with the general customs and usage of its trade is immaterial because it owed no duty to decedent is untenable. (Of course, if by the term "duty" respondent means the liability of manufacturer to the ultimate user in the circumstances of this case, then this simply assumes the result below and begs the entire question.)

2. Nor can the result reached by the majority of the court below be justified on the ground that as a matter of law respondent did not fall below the required standard of care (or did not create an unreasonable risk of harm) because the danger in question was manifest or readily observable. For respondent tacitly, and necessarily, concedes that the owner of a building, for example, may be liable to the ultimate user of an elevator or escalator therein if such elevator or escalator does not have the customary safety devices or guards to prevent injury, even though the danger is manifest (respondent's brief, p. 14). This was so held by the New York Court of Appeals in *Regan v. Eight Twenty Fifth Corp.*, 287 N. Y. 179 (1941) (elevator) and by the court below in its prior decision in *Lee* v. *Pennsylvania R. Co.*, 192 F. 2d 226 (2nd Cir. 1951) (escalator). (Respondent's rationalization of these decisions on the ground that in *Regan* and *Lee* the defendant owed a duty to the plaintiff whereas here respondent owed no duty to decedent is untenable, as has been seen.) Thus, as responent (and perforce the majority of the court below) reads New York law, the owner of a building may be liable to the ultimate user for the *manufacturer's* negligence in failing to equip his machinery with customary safety devices or guards (even though the danger is manifest) but no action will lie against the manufacturer, himself, the person upon whom the primary responsibility should reasonably rest. This

clearly is an absurd result and is simply the archaic doctrine of privity all over again. The decision by the majority of the court below cannot possibly be justified by the holdings in the *Campo* and *Inman* decisions or by the language of those decisions read in context. The decision by the majority of the court below is clearly contrary to the unmistakable movement of New York decisional law away from the archaic and repudiated doctrine of privity ever since *MacPherson*, e.g., *Smith* v. *Peerless Glass Co.*, *supra*, and it turns the clock of New York law backwards. Indeed, in *Inman*, itself, the New York Court of Appeals extended *MacPherson* to abolish the doctrine of privity as between architect and builder on the one hand, and ultimate user, on the other.

3. Respondent states in its brief (pp. 4-5):

> "John Briante had never seen the decedent get out of the cab when the bucket was not fully lowered (48a). About two months after the machine was obtained, when he saw some machine operators get out of the cab when the bucket was not on the ground, he warned them against doing so, not because he had read in the Manual that it was a dangerous practice, but he knew it was dangerous (47a, 48a, 49a)."

The "he" in the second sentence is John Briante, not decedent. The question of decedent's contributory negligence, if any, which of course is a matter for the jury, is not in issue here since petitioner's case was dismissed as a matter of law on the issue of respondent's negligence.

Respectfully submitted,

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Counsel for Petitioner

May 28, 1959.